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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LAUREN O'GRADY, Plaintiff and Appellant, v. MERCHANT EXCHANGE PRODUCTIONS, INC., Defendant and Respondent.	A148513 (San Francisco County Super. Ct. No. CGC-15-547796)

An employer is in the business of providing a banquet facility at which food and beverages are served. The employer automatically adds a substantial "service charge" to the contract for every banquet. The issue presented here is whether the "service charge" *may* be a "gratuity" that Labor Code section 351[1] requires to go to the non-managerial employees involved with the actual serving of the food and beverages. An employee filed a putative class action to force the employer to treat the service charge as a gratuity and distribute all of it to employees. The employer takes the position that two Court of Appeal opinions establish, as a matter of law under *stare decisis*, that a service charge can never be a gratuity. The trial court agreed, sustained the employer's general demurrer without leave to amend, and entered a judgment of dismissal.

We conclude there is no categorical prohibition why what is called a service charge cannot also meet the statutory definition of a gratuity. In light of this conclusion,

[1] Statutory references are to the Labor Code unless otherwise indicated.

and because plaintiff has not been allowed at least one opportunity to amend her complaint, we reverse.

BACKGROUND

Plaintiff Lauren O'Grady describes herself in her complaint as "a banquet server and bartender at the Julia Morgan Ballroom" in San Francisco that is owned and operated by defendant Merchant Exchange Productions, Inc . Plaintiff brought this putative class action for herself "and on behalf of all others similarly situated, namely all other non-managerial food and beverage banquet service employees who have worked at the Julia Morgan Ballroom."

The object of the action was defendant's practice of "routinely" and "automatic[ally]" imposing "a 21% service charge to its food and beverage banquet bills." Part of the monies collected are retained by defendant, with the rest distributed by defendant to "managers and other non-service employees." Plaintiff alleged that the service charge constituted a gratuity, but defendant "has failed to distribute the total proceeds of these gratuities to non-managerial food and beverage banquet service employees as required by California law," and thus defendant's practice "violates" section 351.

This point, because it is central to our decision, merits quotation of the relevant allegations in full: "It is typical and customary in the hospitality industry that establishments impose gratuity charges in the range of 18-22% of the food and beverage bill. [¶] Thus, when customers have paid these charges, it is reasonable for them to have believed they were gratuities to be paid to the service staff. [¶] Indeed, because of the way these charges are depicted to customers, and the custom in the food and beverage industry that gratuities in the range of 18-22% are paid for food and beverage service, customers have paid these charges reasonably believing they were to be remitted to the service staff. [¶] However, the defendant has not remitted the total proceeds of these gratuities to the non-managerial employees who serve the food and beverages. [¶] Instead, the defendant has had a policy and practice of retaining for itself a portion of

these gratuities and/or using a portion of these gratuities to pay managers or other non-service employees."

Defendant's practice was alleged to support causes of action for "statutory gratuity violation," "intentional interference with advantageous relations," "breach of implied contract," and "unjust enrichment."

Based on *Searle v. Wyndham Internat., Inc*. (2002) 102 Cal.App.4th 1327 (*Searle*) and *Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364 (*Garcia*), the trial court determined defendant was not violating section 351. Because the alleged statutory violation was the predicate for each of plaintiff's causes of action, the trial court sustained defendant's general demurrer to the entire complaint. Plaintiff appeals from that ruling.[2]

DISCUSSION

Standard Of Review

The scope of permitted review is well established: "It is well established that a demurrer tests the legal sufficiency of the complaint. [Citations.] On appeal from a dismissal entered after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the [complaint] states a cause of action as a matter of law. [Citations.] We give the [complaint] a reasonable

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[2] Although plaintiff purports to appeal from a "judgment of dismissal after an order sustaining a dismissal," the record and the register of actions establish that only the order sustaining the demurrer was ever filed or entered. That order is not itself appealable (*I. J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331), but it may be reviewed on appeal from an ensuing judgment or order of dismissal. (Code Civ. Proc., § 906; *Jennings v. Marralle* (1994) 8 Cal.4th 121, 128.) Nevertheless, "[t]he fact that no judgment of dismissal was entered on the order sustaining the demurrer does not present an insurmountable obstacle to the appeal." (*Shepardson v. McLellan* (1963) 59 Cal.2d 83, 88.) It would be inefficient to dismiss the appeal, order the trial court to enter a judgment of dismissal on the sustained demurrer, and then permit a subsequent appeal from the dismissal. (*Ibid.*) Instead, as the parties treat the appeal as properly before us, we "deem[] the order sustaining the demurrer to incorporate a judgment of dismissal and interpret [] plaintiff's notice of appeal as applying to such dismissal." (*Federer v. County of Sacramento* (1983) 141 Cal.App.3d 184, 185.)

interpretation, reading it as a whole and viewing its parts in context. [Citations.] We deem to be true all material facts that were properly pled. [Citation.] We must also accept as true those facts that may be implied or inferred from those expressly alleged. [Citation.] We . . . do not accept contentions, deductions or conclusions of fact or law. [Citations.]" (*City of Morgan Hill v. Bay Area Air Quality Management Dist*. (2004) 118 Cal.App.4th 861, 869–870.) Nor do we consider the pleader's ability to prove its allegations. (*Caldera Pharmaceuticals, Inc. v. Regents of University of Cal*. (2012) 205 Cal.App.4th 338, 350.)

The Nature Of "Gratuity" Under Section 351

"Gratuity" is statutorily defined to " include[] any tip, gratuity, money, or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for goods, food, drink, or articles sold or served to the patron." (§ 350, subd. (e).)

Section 351 provides: "No employer or agent[3] shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. An employer that permits patrons to pay gratuities by credit card shall pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing fees or costs that may be charged to the employer by the credit card company. Payment of gratuities made by patrons using

[3] " 'Agent' means every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees." (§ 350, subd. (d).) It is clear that an employer who establishes a tip pool cannot require, or allow, that a portion of it go to the employer's agent. (*Jameson v. Five Feet Restaurant, Inc*. (2003) 107 Cal.App.4th 138, 143–145.); accord, *Budrow v. Dave & Buster's of California, Inc*. (2009) 171 Cal.App.4th 875, 878 ["Section 351 would be violated if management collected any part of the tip"].)

credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment."

The purpose of section 351 is to prevent employers from using any gratuity-related practice which reduces an employee's wages, or diverts monies belonging to employees, practices which are condemned as a "fraud upon the public." (§ 356; see *Henning v. Industrial Welfare Com*. (1988) 46 Cal.3d 1262, 1270–1275, 1278–1279; *Searle*, at 1332.)

The Indefinite Nature of A "Service Charge"

The terms "tip," "gratuity," "service charge" are commonly used as if they are interchangeable synonyms. (E.g., Cal. Code Regs., tit. 18, § 1603(h).) Many other states expressly use them all in measures that serve the same function as section 351.[4] However, investigation demonstrates that "service charge" is a protean term of no fixed meaning.

Black's defines service charge as "A charge assessed for performing a service." (Black's Law Dict. (10th ed. 2014) p. 1576, col. 2.) This tautological imprecision is hardly helpful, but it is representative. (See, e.g., Oxford Eng. Dict. "a charge made . . . for services rendered"("service charge" OED Online, Oxford University Press (June 2017) [www.oed.com/viewEntry 176678 [as of June 22, 2018]; Webster's 10th Collegiate Dict. (1993) p. 1067, col. 2 ["a fee charged for a particular service"].) Viewed in isolation, "service charge" is an amorphous, shapeless concept. It only assumes meaning from the surrounding context.

For example, in the context of retail installment contracts, it commonly means interest on an unpaid installment (*Dickey v. Bank of Clarksdale* (Miss. 1938) 184 So.

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[4] See, e.g., *In re Alleged Labor Law Violation of Chafoulis Mgmt. Co*. (1997 Minn.Ct.App.) 572 N.W.2d 326 [statute & explanatory regulation]; Tenn. Code Ann., § 50-2-107. Hawaii has a statute unequivocally declaring that a service charge by "[a]ny hotel or restaurant . . . for the sale of food or beverage services" is "tip income" which shall be distributed "directly to its employees" unless the establishment has "clearly disclose[d] to the purchaser of the services that the service charge is being used to pay for costs or expenses other than wages and tips of employees." (Hawaii Rev. Stat. § 481B-14 construed in *Davis v. Four Seasons Hotel Ltd*. (2010 Hawaii) 228 P.3d 303.)

314; *TruServ Corp. v. Morgan's Tool & Supply Co., Inc*. (Pa. 2012) 39 A.3d 253; *Michigan Pipe & Valve-Lansing, Inc. v. Hebeler Enterprises, Inc*. (Mich.App. 2011) 808 N.W.2d 323; *Kenworthy v. Bolin* (Wash.App. 1977) 564 P.2d 835); but if interest is stated separately, it can be viewed as a late fee. (*Roy A. Miller & Sons, Inc. v. Industrial Hardwoods Corp*. (Ind.App. 2002) 775 N.E.2d. 1168.) In this context, the service charge would appear to be a cost for delayed payment of the principal.

In the context of public utilities, a service charge is a fee charged for commencing, maintaining, or discontinuing gas, electricity, water, etc. (Gov. Code, § 54346.2; *Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195; *Craig v. City of Macon* (Mo. 1976) 543 S.W.2d 772; *Mountain Cable Co. v. Department of Taxes* (Vt. 1998) 721 A.2d 507; *Roanoke v. Fisher* (Va. 1952) 70 S.E.2d 274; cf. Gov. Code, § 53056 [regulating amount of service charge by cable television system]; *In re Vista Marketing Group Ltd*. (Bankr. N.D. Ill. 2016) 557 B.R. 630.) In this context, the service charge would appear to represent a labor cost.

California pays particular attention to use of service charges to evade statutory commands or duties. For example, " ' "A lender is not prohibited from charging an extra and reasonable amount for incidental services, expenses or risk additional to the lawful interest other than for the loan of money. He may make a reasonable charge for investigating, arranging, negotiating, brokering, making, servicing, collecting and enforcing his obligation, " ' " so long as the "service charge" is not a subterfuge for evading usury limits. (*Forte v. Nolfi* (1972) 25 Cal.App.3d 656, 681, quoting *Klett v. Security Acceptance Co*. (1952) 38 Cal.2d 770, 787.) An insurer is allowed similar latitude so long as it is not using a service charge to inflate the premium. (*Troyk v. Farmers Group, Inc*. (2009) 171 Cal.App.4th 1305, 1324–1325.) And every credit card company and retailer "who fails to correct a billing error" within the statutory period "shall not be entitled to . . . any interest, finance charges, service charges, or other charges." (Civ. Code, §§ 1747.50, subd. (b) [credit card issuer], 1747.60, subd. (b) [retailers].)

In short, simply calling something a "service charge" hardly ever explains what it is or why it is being imposed.

Given that the context here also involves the provision of food and drink, the restaurant tip pool decisions are an obvious point of reference. At this point it is appropriate to consider the two decisions deemed controlling by the trial court, both of which involved tipping, compulsion, and service charges.

Searle* And *Garcia

In *Searle*, a San Diego hotel imposed a service charge of 17% to every room service order. The bill presented with each room service order set out the amount of the order itself; the 17% service charge; a $3 "room delivery charge"; and "a blank line for a tip or gratuity." "According to Searle, the hotel's room service billing practice is deceptive because guests are not advised the service charge is in fact a gratuity paid to the server. Searle also contends the service charge is unfair because it compels guests to pay a gratuity, which Searle believes should be entirely voluntary. Thus Searle allege[d] the hotel's room service practices violate the unfair competition law (UCL)." (*Searle*, *supra*, at pp. 1330–1331.)

Section 351 does not feature prominently in *Searle*. The statute is mentioned as codifying state policy that " 'ensure[s] that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them.' " (*Searle*, at p. 1332, quoting *Leighton v. Old Heidelberg, Ltd*. (1990) 219 Cal.App.3d 1062, 1068.) The Court of Appeal concluded the hotel's billing practice was not an unfair one: "[O]ther than Labor Code section 351, we are not aware of any express regulation of tipping on room service billing. Because [the hotel's] practice is alleged to cause servers to receive more in the way of tips than would otherwise occur, it plainly does not violate the spirit or letter of Labor Code section 351." (*Searle*, at pp. 1333–1334.)

The court explained: "Anyone who has debated with a small child about the temptations presented by an in-room minibar stocked with $3 candy bars and $2 sodas will recognize that a hotel has many means of generating revenue from its guests. What a

hotel does with the revenue it earns—from either the minibar, in-room movies or its room service charges—is of no direct concern to hotel guests. The minibar patron, like the room service patron, is given both clear notice the service being offered comes at a hefty premium and the freedom to decline the service. Just as the hotel patron has no legitimate interest in what the hotel does with the large premium it earns from its minibar snacks, the patron has no legitimate interest in what the hotel does with the service charge. The hotel is free to retain for itself the large premium, as well as the service charge, or to remit all or some of the revenue to its employees. Because the service charge is mandatory and because the hotel is free to do with the charge as it pleases, the service charge is simply not a gratuity which is subject to the discretion of the individual patron.

"Moreover, the hotel's decision to compensate its room service servers by way of the 17 percent service charge in no material way interferes with the patron's reasonable expectations with respect to the custom of tipping. As commentary, custom and Labor Code section 351 make clear, tipping is solely a matter between patron and server. While some patrons will care about what the server receives from his employer, others will not. The curiosity of those who . . . want to know how much the server has in his pocket is just that: curiosity. It is a curiosity about something, i.e., the server's financial condition, in which the tipper has no legitimate interest.

"[I]n arguing that it is deceitful to fail to clearly notify hotel guests that the service charge is paid to the server, Searle again assumes the patron has some right to know what the hotel is paying the room service server. . . . [W]e are not willing to indulge the notion that the custom of tipping somehow gives patrons the right to know how much a server is being paid by his or her employer. In this situation the only obligation the hotel has to the patron is the one codified in Labor Code section 351: an assurance that, however large or small, the tip will go to the server, not the employer. Wyndham's compensation practices of course fully meet this obligation. In sum, in failing to advise its guests as to how it compensates its employees, the hotel is not guilty of any deceit even under the broad provisions of the UCL." (*Searle*, at pp. 1334–1335.)

The *Searle* court proceeded the way it did it because it accepted the truth of Searle's allegation that the service charge was used to pay employee gratuities. Thus its conclusion that "[i]n the final analysis we are not offended by the hotel's practice of treating the service charge as a means of providing reliable compensation to its employees and not as a substitute for the customary tip. The hotel's service charge practices provide a guaranteed level of compensation for its servers and at the same time encourage its servers to provide the hotel's guests with good service." (*Searle*, at p. 1336.)

The plaintiffs in *Garcia* were service workers employed by hotels in Los Angeles. A city ordinance in plain effect directed hotel employers to treat mandatory service charges as owed "to workers who render the services for which the charges have been collected."[5] (*Garcia,* at p. 370.) The Court of Appeal rejected the hotels' contention that the ordinance was preempted by section 351:

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[5] Quoting parts of the ordinance, the *Garcia* court described its terms thusly: "The operative provisions of the Ordinance are codified in sections 184.00 through 184.06 of the Los Angeles Municipal Code. [Citation.] Section 184.02 states in pertinent part: 'Service Charges shall not be retained by the Hotel Employer but shall be paid in the entirety by the Hotel Employer to the Hotel Worker(s) performing services for the customers from whom the Service Charges are collected.' [Citation.] Service charges may not be paid to 'supervisory or managerial employees,' and must be paid to 'Hotel Worker(s) equitably and according to the services that are or appear to be related to the description of the amounts given by the hotel to the customers.' [Citation.] Service charges collected for banquets or catered meetings 'shall be paid equally to the Hotel Workers who actually work the banquet or catered meeting'; service charges collected for room service 'shall be paid to the Hotel Workers who actually deliver the food and beverage associated with the charge'; and service charges collected for porterage services 'shall be paid to the Hotel Workers who actually carry the baggage associated with the charge.' [Citation.] Gratuities and tips left by customers for a hotel worker are excluded. [Citation.] [¶] A 'service charge' is defined in the Ordinance as 'all separately-designated amounts collected by a Hotel Employer from customers that are for service by Hotel Workers, or are described in such a way that customers might reasonably believe that the amounts are for those services, including but not limited to those charges designated on receipts under the term "service charge," "delivery charge," or "porterage charge." ' [Citation.]" (*Garcia*, at pp. 375–376, fns. omitted.)

"The Labor Code mandates that all gratuities are employees' property. (§§ 350–356.) A 'gratuity' is 'any tip, gratuity, money, or part thereof that has been paid or given to or left for an employee by a patron of a business *over and above the actual amount due the business for services rendered* or for goods, food, drink, or articles sold or served to the patron. . . .' (§ 350, subd. (e), italics added.) A gratuity is not a service charge. A service charge is a separately designated amount collected by a hotel from patrons that is part of the amount due the hotel for services rendered, rather than something 'over and above the amount due.' [Citation.] Thus, a service charge by definition is not a gratuity. The Legislature has made clear that amounts due for services (which include service charges) are not gratuities. This interpretation is confirmed by a recent amendment to the definition of gratuity carving out an exception for dancing services. (§ 350, subd. (e).)" (*Garcia, supra,* at p. 377.)

"The definition of gratuity in section 350, subdivision (e) does not define employers' property rights; it establishes the meaning of 'gratuity' as that term appears elsewhere in the statute. [Citation.] Section 351 prohibits employers from collecting, taking, or receiving any gratuity or part thereof and declares: 'Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for.' (§ 351.) When read in this statutory context, a 'gratuity' as that term is defined in the statute does not refer to employers' property rights. [Citation.] We do not read section 351 or any other provision in the Labor Code governing gratuities to address employers' property rights." (*Garcia*, at p. 378)

"The Ordinance does not contradict the Labor Code. The Labor Code and the Ordinance address different subjects and attempt to prevent different harms. [Citations.] The Labor Code attempts to prevent fraud on the public in connection with the practice of tipping to ensure employees receive the tips left for them by the patron. [Citations.] The Ordinance addresses certain hotels' business practices of pricing services based upon two components—a base price and a surcharge, designated as a 'service charge.' The service charge is not negotiable and is part of the amount the patron must pay for the services. The Ordinance does not prevent hotels from charging patrons for services, but it

recognizes that the 15 percent to 20 percent service charge misleads the public into assuming that the service charge is being distributed to the worker performing the services. The Ordinance mandates that the service charge must be paid to the worker. Thus, the Ordinance does not prohibit what the Labor Code commands or command what it prohibits." (*Garcia*, at 379, fn. omitted.)

"As we have previously stated, the definition of gratuity, when read in context, does not address employers' property rights. Neither the statute [i.e., section 351] nor the legislative history of the Labor Code provisions regulating gratuities indicate the Legislature has considered the ownership of services charges, or has expressed an intent to prohibit local regulation of service charges. [¶] The Legislature may have devoted a whole separate article to gratuities, . . . but sections 350 to 356 do not even completely cover the subject of gratuities. As the tip-pooling cases illustrate, the Labor Code does not even address all employer conduct in connection with gratuities. [Citations.] [¶] . . . We do not agree with the hotels that the legislative history reveals the Legislature's 'conscious decision to allow employers to keep service charges.' We cannot locate any citation to the legislators' consideration of service charges. On the record before us, we conclude the Legislature has not turned its attention to this issue. It is therefore not a matter that has become a state concern." (*Garcia*, *supra*, at p. 380)

"The paramount state concern in the Labor Code is in regulating gratuities and preventing fraud on the public in connection with the practice of tipping. (§§ 351, 356.) The Legislature, however, has not expressed a paramount concern to ensure that employers have absolute ownership of business revenue designated as a 'service charge.' " (*Garcia*, *supra*, at pp. 380–381.)

Searle and *Garcia* do involve "service charges" imposed in the context of selling food and drink to the public, charges that were intended to function as gratuities. However, there are crucial distinguishing features that prevent these decisions from being controlling precedent. In *Searle*, the bill presented to the room service customer clearly differentiated between the service charge and the gratuity the customer could choose to add. The service charge used by the employer as the source of internally-assigned

gratuities was not disclosed to the customer. The purpose of section 351 being to ensure that all of a tip goes to the employee, there was no problem when the hotel's practice was "alleged to cause servers to receive *more* in the way of tips" than the person ordering room service may have intended: the practice did not "violate the spirit or letter" of the statute. (*Searle*, *supra*, at pp. 1333–1334, italics added.) Here, plaintiff alleges that precisely the opposite is occurring. The ordinance in *Garcia* clearly treated service charges as gratuities and, like sections 350 and 351, mandated that they go only to employees performing the service, not management. In *Searle* the mandatory service charge was imposed by the employer. In *Garcia* what the employer might call a service charge was legislatively reclassified as a gratuity. The voluntary nature of a gratuity discussed in *Searle* is thus incompatible with the actual results in *Searle* and *Garcia*, namely, allowing a mandatory gratuity to stand. In light of these differences, neither *Searle* nor *Garcia* are controlling. Neither, or both together, should be read, as defendant does, as categorially establishing that a service charge—even a mandatory one—can never qualify as a gratuity.

Accordingly, plaintiff's cause of action, for "statutory gratuity violation" is not foreclosed by *Searle* and *Garcia*, as the trial court believed, and is sufficient to survive a general demurrer.

It may well be that there are further impediments. For example, tipping is ordinarily thought of as a voluntary bilateral transaction between the patron of a commercial establishment and the employee of the establishment. Moreover, there are decisions treating the patron's intent as unascertainable, if not irrelevant. (See *Leighton v. Old Heidelberg, Ltd*., *supra*, 219 Cal.App.3d 1062, 1069 ["We dare say that the average diner has little or no idea and does not really care who benefits from the gratuity he leaves, as long as the employer does not pocket it, because he rewards for good service no matter which one of the employees directly servicing the table renders it." This, and the near impossibility of being able to determine the intent of departed diners in leaving a tip"]; quoted with approval in *Avidor v. Sutter's Place, Inc*. (2013) 212 Cal.App.4th 1439, 1446–1447, & fn. 2, 1448 ["customer intent is not relevant"];

Etheridge v. Reins Internat. California, Inc. (2009) 172 Cal.App.4th 908, 919–920; *Budrow v. Dave & Buster's of California, Inc*., *supra*, 171 Cal.App.4th 875, 880, fn. 4.) On the other hand, the context here involves large sums, almost certainly pursuant to a written contract, where the universe of patrons, and their intent vis-à-vis the mandatory "service charge," may be more subject to discovery than ordinary restaurant diners.

On the other hand, those same decisions, considering so-called "tip pools," accept that voluntary donative intent is not a fetish. An accepted element of coercion may enter when a third party—the employer—imposes a mandatory practice requiring employees to share gratuities voluntarily made by customers. The customer may intend the gratuity left to go only to the individual who personally served him or her at the table, but the employer's tip pool sharing policy will be enforced. We are also mindful that Labor Code provisions concerning compensation and working conditions are liberally construed in favor of employees. (E.g., *Augustus v. ABM Security Services, Inc*. (2016) 2 Cal.5th 257, 262; *McLean v. State of California* (2016)1 Cal.5th 615, 622.) Both section 350 and section 351 define a gratuity as what is "paid . . . for an employee by a patron." This language does not preclude the possibility that the payment may not be entirely voluntary in the mind of the patron.

Plaintiff also suggests a custom "in the hospitality industry" to treat sums designated as "service charges" as gratuities for employees. For present purposes, we accept the existence of such an industry custom, however inartfully alleged. (E.g., *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1978) 21 Cal.3d 365, 382 ["custom is established by the allegations of the . . . complaint"]; *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 842–843; cf. *Shaw v. Cal. Dept. of Alcoholic Beverage Control* (9th Cir. 1986) 788 F.2d 600, 610 ["The plaintiffs need not specifically allege a custom or policy; it is enough if the custom or policy can be inferred from the allegations of the complaint"].)

We only allude to the matters, for at this outset of the pleading stage, we are not to be concerned with whether plaintiff can prove the allegations of her complaint. (*Caldera Pharmaceuticals, Inc. v. Regents of University of Cal*., *supra*, 205 Cal.App.4th 338, 350.)

In light of the foregoing, it remains only to briefly look at plaintiff's other causes of action.

The trial court concluded that plaintiff's second cause of action, for "intentional interference with advantageous relations," and her third cause of action, for breach of implied contract," defective because "Our case law teaches that you need to show . . . that that interference is done wrongfully. There's no allegation here of . . . anything being done wrongfully." However, it is an obvious inference, which is sufficient here (see *City of Morgan Hill v. Bay Area Air Quality Management Dist*., *supra*, 118 Cal.App.4th 861, 869), and which could be easily supplied in an amended pleading.

The trial court concluded that plaintiff's final cause of action, for unjust enrichment, "under California law, it's not a cause of action." This is too broad, it can be a viable cause of action. (E.g., *Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc*. (2018) 29 Cal.App.5th 230, 238; *Lyles v. Sangadeo-Patel* (2014) 225 Cal.App.4th 759, 769; *Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 722.) This may be especially true when the gravamen of the claim rests upon conduct or a practice that might be tantamount to conversion (cf. *Lu v. Hawaiian Gardens Casino, Inc*. (2010) 50 Cal.4th 592, 603–604 ["To the extent that an employee may be entitled to certain misappropriated gratuities, we see no apparent reason why other remedies, such as a common law action for conversion, may not be available"]), and would thus easily qualify as "wrongful" for purposes of the second and third causes of action.

Finally, this is an original complaint, making it the subject of an additional solicitude. As the leading treatise puts it: " 'Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given.' [Citations.] [¶] Indeed, in the case of an original complaint, plaintiff need not even request leave to amend. 'Unless the complaint shows on its face that is incapable of amendment, denial of leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is requested or not.' [Citations.]" Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 7:129, p. 7(1)-58.)

DISPOSITION

The "Order Granting Defendant Merchant Exchange Productions, Inc.'s Demurrer to Plaintiff's Class Action Complaint" filed April 5, 2016, is amended by adding a paragraph dismissing the complaint. As so modified, the order/judgment is reversed. Plaintiff shall recover her costs on appeal.

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Richman, Acting P.J.

We concur:

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Stewart, J.

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Miller, J.

O'Grady v. Merchant Exchange Productions, Inc. et al. (A148513)